UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KYLE P. CURRIER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 97-223-P-C***
	)	
INFINITY FEDERAL CREDIT UNION,	***)***	
	)	
Defendant[1]	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS AND REQUEST FOR ATTORNEY FEES AND COSTS

The defendant, Infinity Federal Credit Union, moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the claims asserted by the plaintiff under the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*, in Counts I and III of the complaint, on the ground that such claims are barred by the applicable statute of limitations. I recommend that the court grant the motion and deny the defendant's accompanying request for an award of attorney fees and costs.

I. Applicable Legal Standard

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor."

[1] The complaint names an additional defendant, Telco of New England Federal Credit Union, but the defendant states that this is not a separate entity. Telco of New England Federal Credit Union changed its name to Infinity Federal Credit Union in 1995. Defendants' Motion to Dismiss, etc. ("Defendant's Motion") (Docket No. 2) at 1 n.1.

Pihl v. Massachusetts Dep't of Educ., 9 F.3d 184, 187 (1st Cir. 1993). However, the court need not accept "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Review is limited to allegations in the complaint; the court may not consider factual allegations, arguments and claims that are not included therein. *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996).

II. The Motion to Dismiss

The complaint, in Count I, alleges that the defendant's termination of the plaintiff's employment as its "controller" on February 17, 1995 violated the Maine Human Rights Act ("MHRA") because it was due to her pregnancy. Complaint (Docket No. 1) ¶¶ 12, 19-22. Count III of the complaint alleges that the defendant retaliated against the plaintiff for her request for an accommodation due to her pregnancy, also in violation of the MHRA. *Id.* ¶¶ 28-30.

The MHRA provides that any court action filed "under this Act" "shall be commenced not more than 2 years after the act of unlawful discrimination complained of." 5 M.R.S.A. § 4613(2)(C). The defendant contends that this statute of limitations bars the state-law claims in the complaint because the complaint was not filed until June 29, 1997, more than two years after the termination of the plaintiff's employment. Defendant's Motion at 4.[2]

The plaintiff responds that this court should postpone any action on the motion to dismiss

[2] In fact, the complaint was filed on June 27, 1997.

because her attorney is also representing another woman with a claim of pregnancy discrimination against this defendant in a proceeding brought before the Maine Human Rights Commission on October 1, 1997 arising out of an employment termination in April 1997. Plaintiff's Objection to Defendant's Motion to Dismiss, etc. (Docket No. 4) at [3]-[4]. This other claimant, the plaintiff asserts, will seek joinder of her claim, once it is brought in this court, with the instant claim, and only then will it be possible for her to establish "some continuing pattern or set of practices, policies, or events which would show evidence of *continuing violation by Infinity after her termination.*" *Id.* at [4] (emphasis in original). The plaintiff cites no authority in support of this proposition.

The plaintiff apparently assumes that the concept of "continuing violation" developed in case law construing federal claims under Title VII, 42 U.S.C. § 2000e-5 *et seq.*, applies to claims under the MHRA, a point which has not been addressed by the Maine Law Court. The First Circuit noted in *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429 (1st Cir. 1997), that "[t]he Maine courts have relied on the federal case law surrounding Title VII for the purpose of construing and applying the provisions of the Maine Human Rights Act." *Id*. at 436 n.3. Assuming only for purposes of this motion that this observation also applies to a statute of limitations in the state statute that differs significantly from that of Title VII, *compare* 5 M.R.S.A. § 4613(2)(C) *with* 42 U.S.C. § 2000e-5(f), the continuing-violation theory as developed in the federal case law will not save the plaintiff's state-law claims in this case.

There are two types of continuing-violation cases under Title VII: systemic and serial. *DeNovellis v. Shalala*, 124 F.3d 298, 307 (1st Cir. 1997). A systemic violation "has its roots in a discriminatory policy or practice; so long as the policy or practice itself continues into the limitation period, a challenger may be deemed to have filed a timely complaint." *Id.*, quoting *Jensen v. Frank*, 912 F.2d 517, 523 (1st Cir. 1990). A serial violation "is composed of a number of discriminatory acts

emanating from the same discriminatory animus, each act constituting a separate wrong actionable under Title VII." *Id*., quoting *Jensen*, 912 F.2d at 522. Extending to the plaintiff every possible favorable inference from the allegations of the complaint, no claim of a systemic violation is set forth. The complaint also does not mention the 1997 termination of another employee upon which the plaintiff now seeks to rely.

Even if the complaint did so, however, the plaintiff's argument is based on a fundamental misunderstanding of the continuing-violation theory: it must be the plaintiff, not another party, whether or not that second party has actually brought a claim against the same defendant, who has been injured by the continuing violation in order to recover. A plaintiff may not import the claim of another employee into her action for employment discrimination in order to revive her stale claim. The plaintiff certainly lacks standing to raise the claims of another employee, even when she seeks to assert that claim only in order to render her own claim timely. This basic legal precept appears to me to be self-evident. Indeed, my legal research has failed to generate any reported Title VII decision in which the plaintiff's argument was even raised.

The defendant is entitled to dismissal of Counts I and III of the complaint.

III. The Request for Fees and Costs

The fact that the defendant will be successful in its motion to dismiss if my recommendation is accepted by the court does not mean that the defendant is necessarily entitled to recover its attorney fees and costs associated with the motion pursuant to 28 U.S.C. § 1927, as the defendant has requested. Here, the dismissal sought relates only to the state-law claims, and 5 M.R.S.A. § 4614 would ordinarily provide the appropriate authority for this request. That statute allows the court, in its discretion, to award attorney fees and costs to a prevailing party. In its only reported decision construing this statute,

the Law Court held that the test for determining whether a party seeking to recover fees and costs is a "prevailing party" is the same under section 4614 as that applied by the First Circuit to claims arising under 42 U.S.C. § 1988. *Maine Human Rights Comm'n v. Allen*, 474 A.2d 853, 857 (Me. 1984). However, the plaintiff seeks recovery here only under 28 U.S.C. § 1927, which provides separate authority for recovery of "excess" costs, expenses and fees directly against an attorney as a sanction when the attorney "multiplies the proceedings . . . unreasonably and vexatiously" in any action brought in a court of the United States.

In the First Circuit, a finding of subjective bad faith in not a necessary prerequisite to the imposition of sanctions against an attorney under section 1927. *Cruz v. Savage*, 896 F.2d 626, 631-32 (1st Cir. 1990). "[I]f an attorney's conduct in multiplying proceedings is unreasonable and harassing or annoying, sanctions may be imposed under section 1927." *Id*. at 632. "It is enough that an attorney acts in disregard of whether his conduct constitutes harassment or vexation, thus displaying a 'serious and studied disregard for the orderly process of justice.'" *Id.* To be sanctioned, the conduct must "be more severe than mere negligence, inadvertence, or incompetence." *Id.* The conduct is to be judged by application of an objective standard. *Id.*

Here, while the plaintiff's counsel certainly disregarded the accurate advice of counsel for the defendant that the state claims asserted in the complaint were barred by the applicable statute of limitations, and his argument to this court in opposition to the defendant's motion to dismiss those claims on that basis is without merit, the federal claims remain in the case and the state claims will have been dismissed early in the action, before the defendant has filed an answer. While the conduct of the plaintiff's counsel in asserting clearly time-barred claims must not be condoned, I cannot say that it multiplied the proceedings or otherwise rose to the level that would justify the imposition of section 1927 sanctions. *See, e.g., Bolivar v. Pocklington*, 975 F.2d 28, 33-34 (1st Cir. 1992)

(imposition of section 1927 sanctions upheld where plaintiff's entire case dismissed, claims had no legal basis, and action was initiated as "bald attempt to circumvent" a court order in earlier action).

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss Counts I and III be **GRANTED** and that its request for an award of attorney fees and costs be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 10th day of December, 1997.

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David M. Cohen
United States Magistrate Judge